IN THE

Supreme Court of the United States

Office Supreme Court U. S.
FILED
SEP 25 1906
JAMES H. McKENNEY,
Clerk.

OCTOBER TERM 1906.

No 164.

JOHN C. HAMMOND, PLAINTIFF IN ERROR.

vs.

WILLIAM W. WHITTREDGE, TRUSTEE UNDER THE WILL OF SOLON O. RICHARDSON, DECEASED, ET AL, DEFENDANTS IN ERROR.

Motion to Dismiss or to Affirm.

AND

Brief in Support of Said Motion.

WARREN OZRO KYLE,
FRED JOY,
Counsel for Defendants in Error for the Purposes of said Motion.

BOSTON:
SPATULA PUBLISHING CO., SUDBURY BLDG.
1906.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

JOHN C. HAMMOND, PLAINTIFF IN ERROR.

vs.

WILLIAM W. WHITTREDGE, TRUSTEE UNDER THE WILL OF SOLON O. RICHARDSON, DECEASED, ET AL.

MOTION TO DISMISS OR TO AFFIRM.

And now come William B. H. Dowse and Warren Ozro Kyle, assignees in bankruptcy of Elbridge L. Sweetser under the bankrupt act of 1867, defendants in error, and move the court to dismiss the writ of error in this case for want of jurisdiction, because the decree of the Supreme Judicial Court of Massachusetts to which said writ of error was directed, although it is the decree of the highest court of a state in which a decision could be had, is not against any title, right, privilege or immunity specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States.

And the said defendants in error also move the court to affirm said decree, because, although the record in said cause may show that this court has jurisdiction, yet it is manifest that said writ of error was sued out for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

WARREN OZRO KYLE,
FRED JOY,

Counsel for said Assignees, Defendants in Error for the Purposes of this Motion.

To Hollis R. Bailey, Esq., Counsel for the above-named Plaintiff in Error.

Please take notice that on Monday, on the day of A. D. 1906, at the opening of the court or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies will be submitted to the Supreme Court of the United States for the decision of the court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motions in support thereof.

WARREN OZRO KYLE,

FRED JOY,

Counsel for the said Defendants in Error for the Purposes of these Motions.

BRIEF.

This is a petition for instructions brought in the Supreme Judicial Court of Massachusetts by William W. Whittredge, one of the defendants in error, as the present trustee of certain property held in trust under item 8 of the will of Solon O. Richardson, to find out who was entitled now to receive Elbridge L. Sweetser's half of the fund. This half was claimed by the assignees in bankruptcy of Elbridge L. Sweetser, under a petition filed in 1878, defendants in error here, making the present motions; and also by the plaintiff in error claiming under an alleged equitable attachment in a pending suit begun in November, 1881, and under an assignment made in October, 1885, by the bankrupt to secure two debts incurred after this bankruptcy.

The plaintiff in error admitted that on the death of the testator Elbridge L. Sweetser took an assignable interest which would pass to his assignees in bankruptcy in 1878, bnt the contentions were that the assignees had abandoned this property, had been guilty of laches in asserting any claim thereto, and were barred by U. S. Rev. Stats., § 5057, which provides that "No suit either at law or in equity shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

By the death of the life beneficiaries the fund was ripe for distribution December 15, 1900, and on February 1, 1901, this petition was brought.

The Supreme Judicial Court of Massachusetts decided:—

I. That the interest in controversy was assignable (as admitted by the plaintiff in error).

II. That the title of the assignees in bankruptcy became complete on the assignment to them of this interest in remainder (also admitted by the plaintiff in error, except as to the applicalion by the court of the principles of general and local law relating to assignment of choses in action).

III. That the assignees in bankruptcy had not abandoned the property;—a finding of the court on the facts, not here to be examined or controverted.

IV. That the assignees had not been guilty af laches;—also a finding of the court on the facts, not here to be examined oi controverted.

V. That the contention of the plaintiff in error that one in possession of property is barred from exercising the rights that ownership confers on the owner by not having brought an action is

groundless; — which, we submit, is also a decision of the court on a question of general law which will not here be examined, and which is, indeed, axiomatic.

Having decided the questions of fact and local law, which might have been a possible basis for a federal question, in favor of the assignees in bankruptcy, and against the plaintiff in error, there remained in the case no question as to any title, right, privilege or immunity under a statute of the United States; and the court expressly declined to choose "between the opinion in *Dushane vs Beall*, 161 U. S. 513, and the decision in *Rock vs. Dennett*, 155 Mass. 500." (See opinion of the court Transcript of Record, page 63, 189 Mass. 45–47.)

It has been expressly decided by this court that its jurisdiction in this class of cases does not extend to questions of fact or of local law, which are merely preliminary to, or the possible basis of a federal question.

Telluride Power Co. *vs.* Rio Grande, etc., Ry. Co., 175 U.S. 647.

The rule in cases of this kind was pronounced in *Eustis vs. Bolles*, 150 U. S. 361, as follows: "It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or constitution, or that the judgment as rendered could not have been given without deciding it. *Murdock vs. Memphis*, 20 Wall. 590; *Cook Co. vs. Calumet & Chicago Canal Co.*, 138 U. S. 635.

"It is likewise settled law that, where the record discloses that if a question had been raised or decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

See, also, Harrison *vs.* Morton, 171 U. S. 38.

The plaintiff in error, John C. Hammond, in his motion to be admitted a party respondent in this suit in the Supreme Judicial Court of Massachusetts, stated that he "claims to be entitled to the trnst fund in controversy, *subject to the rights of the assignees in bankruptcy of said Sweetser;*" (see motion of John C. Hammond to be admitted as a party in the suit, Transcript of Record, psge 8), and nowhere in the record does there appear any "title, right, privilege or immunity specially set up or claimed" except in the twentieth paragraph of his amended answer, Transcript of Record, page 17.

The Amended Answer (see page 17 Transcript of Record) does not specially set up or claim any personal right, or personal right of property, under any Act of Congress; but merely pleads a statute of limitations in defence of a title which, as the state court found upon other and distinct grounds, was of no validity. The state court having decided, on grounds involving no Federal question specially raised, that the plaintiff in error never acquired title, it became a purely academic question whether or not he might have successfully pleaded the statute of limitations referred to if the questions of fact had been decided otherwise. He had no right, he had acquired no interest which the law could recognize or protect, and, therefore, he cannot bring here by writ of error any question as to the only statute referred to in the pleadings.

By the terms of the reservation (see Transcript of Record, page 56) the plaintiff in error was limited, even in the State Court, to the questions raised by his answer; (Commonwealth vs. Worcester & Nashua R. R. Co. 124 Mass. 561.) and by the judiciary act the jurisdiction of this Court in cases of this kind is limited to such questions as were specially raised in the pleadings. Revised Statntes of the United States, § 709.

The only rights, titles and immunities arising under the sections of the United States Revised Statutes referred to in the assignment of errors are the rights, titles and immunities of assignees in bankruptcy, and as the decision is in all respects in favor of and not against the rights of the assignees under said statutes this court will not review the decision of the Supreme Judicial Court of Massachusetts.

De Lamar's Mining Co. *vs.* Nesbitt, 177 U. S. 523.

Missouri *vs* Andriano, 138 U, S. 496, and cases cited in the opinion of the court.

The Federal question must be considered as not decided when a question of state law intervenes and is decisive of the case. To give jurisdiction, the Federal question must be necessary to the judgment or decree complained of.

Detroit R. R. *vs.* Guithard, 114 U. S. 133.
Choteau *vs.* Gibson, 111 U. S. 200.
Citizens' Bank *vs.* Board of Liquidation, 98 U. S. 140.
McManus *vs.* O'Sullivan, 91 U, S. 578.
Murdock *vs.* Memphis, 20 Wall 590.
Adams *vs.* Burlington R. R., 117 U. S. 127.
Chapman *vs.* Goodwin, 123 U. S. 548.
Brooks *vs.* Missouri, 124 U. S. 394.
Water Works, *vs.* Sugar Co, 125 U. S. 29.
De Sausure *vs.* Gaillard, 127 U. S. 216.
Israel *vs.* Arthur, 152 U. S. 355.

Wailes *vs.* Smith, 157 U. S 276.
San Francisco *vs.* Itsell, 133 U. S. 567.
Hale *vs.* Ackers, 132 U. S. 554.
Cokran Oil & D. Co., Arnaudet, 199 U. S. 182.
Beals *vs.* Cone, 188, U. S. 184.

The mere averment of the existence of a Federal question is not sufficient to give this court jurisdiction; a real and not a fictitious Federal question is essential to give this court jurisdiction over the judgment of State courts, and when it appears that the alleged Federal question upon which jurisdiction is invoked is wholly without foundation the writ of error will be dismissed.

Sawyer *vs.* Piper, 189 U. S. 154, 156, 157.

The asserted Federal element is too remote and frivolous.

Blythe *vs.* Hinckley, 180 U. S. 333.
Equitable Life Insurance Soc. *vs.* Brown, 187 U. S. 308.

The final decree in this case which this court is asked to reëxamine was entered October 31, 1905. (See Transcript of Record, pages 57 and 58.) From that decree any one of the numerous parties, including the plaintiff in error, considering himself aggrieved, might have appealed at any time within thirty days. Mass. R.L. c. 159 § § 17, 18, 19, and 34. "As such, it was when rendered, open to review by the Supreme Court upon a new appeal, and for that reason was not the final judgment of the highest court of the state in which a decision in the suit could be had." (Mr. Justice Gray, delivering the opinion of the Court in Great Western Telegraph Co. *vs.* Burnham 162 U. S. 339.) Hence it appears that said decree at the time this writ of error was sued out, November 15, 1905, (see Transcript of Record pages 1 and 2) was not a final decree "in the highest court of a state, in which a decision in the suit could be had," and, therefore, this court has no jurisdiction.

U. S. Rev. Stat. section 709.
Great Western Telegraph Co. *vs.* Burnham 162 U. S. 339.
Fisher *vs.* Perkins 122 U. S. 522.

Respectfully submitted,

WARREN OZRO KYLE,
FRED JOY,

Counsel for Assignees in bankruptcy, Defendants in Error, for the purposes of these motions.